

**COMMONWEALTH OF KENTUCKY
KENTUCKY BOARD OF TAX APPEALS
FILE NO. K04-R-07**

DUPONT DOW ELASTOMERS L.L.C.

APPELLANT

v.

ORDER NO. K-19502

**DEPARTMENT OF REVENUE
COMMONWEALTH OF KENTUCKY**

APPELLEE

This appeal was filed by Dupont Dow Elastomers, LLC (Hereinafter Appellant) from a final ruling by the Kentucky Department of Revenue dated May 3, 2004 determining that the results of a sales and use tax audit and its resulting assessment of \$325,098.44 plus applicable interest were legitimate liabilities of the Appellant and due the Commonwealth.

The record in this matter consists of many pre-hearing depositions, documents, briefs and pleadings as well as the video record of testimony and argument before the full board in Frankfort Kentucky held on December 07, 2005.

Based upon the entire record the Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The evidence in this matter was directed at appellant's claim to three categories of exemption from the use tax assessment made by Revenue during the audit period.

The matter can be categorized according to the three claims of exemption from

use tax made by the appellant in its petition and argued throughout this appeal.

The appellant claims that all of the items of “disputed” property are exempt from use tax by application of one or more of these three theories. They are

1. Many items of tangible personal property at issue in this matter are exempt pursuant to KRS 139.470 (11) because they are “industrial supplies” or “industrial tools”.
2. Many items of tangible personal property at issue in this matter are exempt pursuant to KRS 139.480 (10) because they are “machinery” for new and expanded industry.
3. Many items of tangible personal property at issue in this matter are exempt pursuant to KRS 154.45-090 because they are “new [or] used equipment [or] machinery purchased and used by a qualified business within an enterprise zone”

The Department of Revenue on the other hand argues that the appellant has failed in its burden of proof, both during the audit period and during this appeal, to demonstrate that it is entitled to any of these exemptions. Further, the Department of Revenue argues that the disputed items which have been identified do not qualify for any of these exemptions because they are not “industrial supplies”, “industrial tools”, or “machinery” new or used.

Further, the Department of Revenue argues that the disputed items should properly be classified as “repair parts” or “replacement parts” and as such would not be entitled to any use tax exemption under any of the appellant’s three theories.

FINDINGS OF FACT

The record reflects that the disputed items of personal property at issue in this case include predominately such things as gaskets, gauges, screws, scrapers, washers,

bushings, fittings, valves, metering devices, fasteners and fittings.

It was undisputed that all of these items were purchased to repair, maintain or monitor machinery and equipment already in place at appellant's facility.

Appellant's argument was that everything is either machinery (as all the parts of a watch are machinery, assembled or not) or that some of the items like scrapers and monitoring devices were industrial tools.

The statutes and case law of the Commonwealth provide guidance in this area. The observation of the demonstrated items themselves at the hearing was also very illuminating.

It is the opinion of the Board that items like screws, gaskets, bushings, couplings, fittings and fasteners used to repair and or maintain machinery are what the legislature contemplated to be non-exempt repair or replacement parts rather than "machinery". The suggestion that "all parts of every machine are themselves machinery" strains the definition beyond that to which the Board believes would be attributed to its common and ordinary meaning.

It was agreed that the appellant's plant is a "qualified business" operating in an "enterprise zone". However this more restrictive definition of "machinery" than that urged by the appellant applies to the appellant's arguments regarding both the "new and expanded industry" and "enterprise zone" theories. *See, Mansbach Metal Co. v. Commonwealth, 521 S.W.2d 85, 1975 (Ky. 1975).*

Materials and supplies having a useful life of less than a year which were used in the operation, maintenance and repair of machinery were not exempt from the sales and use tax where the materials and supplies consisted basically of nonexempt replacement parts for machinery which was not exempt.

After hearing the testimony of appellant's witnesses it was clear that items claimed to be exempt as "industrial tools" may have been used in the plant but did not come into direct contact with the product being manufactured. The suggestion that the items like scrapers and monitoring devices such as pH meters or flow meters are exempt from taxation because they are "industrial tools" goes too far. See, KRS 139.470 (11) (a) (2)

c. Industrial tools. This group is limited to hand tools such as jigs, dies, drills, cutters, rolls, reamers, chucks, saws, spray guns, etc., and to tools attached to a machine such as molds, grinding balls, grinding wheels, dies, bits, cutting blades, etc. Normally, for industrial tools to be considered directly used in manufacturing, they shall come into direct contact with the product being manufactured.

Neither is the Board persuaded that the disputed items are exempt as "industrial supplies" because they all appear to either be repair parts or replacement parts. See, KRS 139.470 (11) (a) (2)

b. Supplies. This category includes supplies such as lubricating and compounding oils, grease, machine waste, abrasives, chemicals, solvents, fluxes, anodes, filtering materials, fire brick, catalysts, dyes, refrigerants, explosives, etc. The supplies indicated above need not come in direct contact with a manufactured product to be exempt. "Supplies" does not include repair, replacement, or spare parts of any kind.

CONCLUSIONS OF LAW

The Board concludes that the appellant has failed to meet its burden of proof to bring the disputed items within the exemptions claimed and that the final ruling of the Department of Revenue should be sustained.

ORDER

It is hereby ordered by the Board that the assessment of taxes and applicable interest for the periods covered by the Final Ruling number 2004-6 is affirmed.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to

Order No. K-19502

the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER
AND MAILING: March 20, 2006**

FULL BOARD CONCURRING

**NANCY MITCHELL
CHAIR**